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No. 82-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM L. BURTON, *et al.*,
Appellants,

v.

WALKER HOBBIE, JR., *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama (three-judge court)

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether plaintiffs challenging a reapportionment may seek to have this Court postpone imminent elections after having failed to request such relief from the District Court?

2. Whether a District Court which has directed that state legislative elections proceed under an interim reapportionment plan, subject to the preparation of a permanent plan and new elections in 1983, abused its discretion by adhering to that order when the United States Attorney General interposed an objection to the plan under the Voting Rights Act after the election process was well underway?

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Appellees Walker Hobbie, Jr., et al., hereby respectfully move that this Court dismiss the appeal or affirm the judgment below.

INTRODUCTION

In this case appellants seek relief from implementation of an interim reapportionment plan for the upcoming general election for the Alabama State Legislature.[1] Appel-

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[1] On September 7, 1982, following Justice Powell's denial of appellants' application for a stay pending appeal, primary elections were held pursuant to the challenged plan. Runoff elections were held on September 28.

lants argue that the plan adopted by the District Court (per Circuit Judge Frank M. Johnson, Jr., and District Judge Truman M. Hobbs), which is essentially identical to Act 82-629, the plan passed by the State Legislature, violates the Voting Rights Act of 1965 and thus cannot be implemented even on a temporary basis. As will be shown, appellants' argument is utterly lacking in merit, and the appeal should be dismissed or the judgment of the District Court affirmed.

STATEMENT OF THE CASE

On October 26, 1981, the Alabama State Legislature passed Act 81-1049, which reapportioned both the State House and the State Senate.[2] Appellants brought suit in the District Court, charging, *inter alia*, that Act 81-1049 violated the Fourteenth and Fifteenth Amendments.[3] The District Court allowed discovery to go forward, but refused to reach the merits of the appellants' claims until

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[2] The Legislature modeled Act 81-1049 after the existing reapportionment plan, which was implemented by court order in 1972. *See Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942. In doing so, the Legislature sought to follow the suggestion of the District Court that the court-ordered plan be used as the foundation for future reapportionments. *See Sims* v. *Amos*, 365 F. Supp. 215, 223 (M.D. Ala. 1973), *aff'd sub nom.*, *Wallace* v. *Sims*, 415 U.S. 902.

[3] Appellants claim that, under Act 81-1049, two black incumbents "were purposefully placed in the same district in central Birmingham so that a new seat in north Shelby County (Birmingham suburban area) with an overwhelming white majority could be created." Jurisdictional Statement ("Jur. St.") at 2 n.1. This is simply untrue. In fact, the creation of a district in Shelby County resulted from the dramatic population growth there over the past decade (74.3% as opposed to 12.9% for the State as a whole) rather than any racially discriminatory purpose. The demographics of Shelby County resulted in this district having a large white majority, as demonstrated by the fact that the alternative plans urged upon the District Court by the appellants also create a district with an "overwhelming white majority" in Shelby County.

Act 81-1049 had received preclearance from the United States Attorney General under Section 5 of the Voting Rights Act.

On May 6, 1982, the Attorney General interposed an objection to Act 81-1049. The District Court, recognizing the need to implement a reapportionment plan in time for the 1982 state legislative elections, ordered the parties to propose interim plans. The Court ordered appellants to submit a plan by May 21, but the appellants did not do so until June 4, at which time they proposed two alternative plans, known as "Amended Plan A" and "Plan B."[4] The Court allowed the State until June 4 to submit a proposal and until June 8 to obtain preclearance from the Attorney General.

The plans proposed by appellants largely disregarded the districts drawn by the State Legislature, and appellants' preferred alternative, Plan B, had an overall popu-

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[4] Appellants' tardy filing of their proposed plans with the District Court belies their assertions (Jur. St. at 3) that they have acted "with dispatch" while the State has moved slowly. In fact, the State took only six months after receiving the 1980 census data in April 1981 to complete the massive task of designing and enacting a plan. Moreover, the State has moved expeditiously both in court and before the Department of Justice. By contrast, the appellants' attorneys, knowing that the Attorney General was required by 28 C.F.R. § 51.8 to complete his review of Act 81-1049 by March 29, 1982 (i.e., within sixty days of the submission of the Act) waited until March 9 to submit their comments on the Act to the Department of Justice. The State's attorneys did not receive these comments until March 16. The Department of Justice asked the State for further information, thereby extending the time for the Attorney General to complete his review. *See* 28 C.F.R. § 51.37. The State responded in a letter dated April 2, 1982. The Attorney General did not object to Act 81-1049 until more than a month later, on May 6. The State immediately began drafting a new plan and presented its proposals to the Department of Justice in only eleven days. Attorneys for the State worked virtually around the clock for the next two weeks to negotiate changes in district lines with the Department of Justice and to obtain passage of Act 82-620.

lation variance in excess of the 10% level this Court has deemed *de minimis*. Moreover, as noted by Judge Frank Johnson,

> [t]he plans are not racially neutral but instead discriminate against white citizens of the State of Alabama. Both Plans A and B submitted by plaintiffs pair a substantial number of white house and senate members against each other. With one insignificant exception, none of the black house or senate members would be required to run against other incumbents. In fact, counsel for plaintiffs acknowledged that one district in Plan B was intentionally altered in order to eliminate the possibility that two black incumbents would be placed in the same district. [Appendix A at A-11—A-12 (Johnson, J., concurring) (note omitted).] [5]

The plan submitted by the State in timely fashion on June 4 (Act 82-629) was developed in response to the Attorney General's objection letter. At a series of meetings held on May 21, 22, 24 and 25, 1982, attorneys for the State and the Department of Justice extensively discussed how Act 81-1049 could be modified so as to obtain preclearance. On the basis of these negotiations, the State Legislature, after being called into special session by Governor Fob James, passed Act 82-629 on June 1, 1982. On that same day, Act 82-629 was submitted to the Department of Justice for preclearance. The State explicitly requested a decision from the Department of Justice by June 8 in order to comply with the District Court's order.

To meet the Attorney General's objection to Act 81-1049, Act 82-629 made changes in 55 of the 105 House Districts which had been proposed in Act 81-1049. These changes resulted in the creation of an additional district

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[5] Unless otherwise noted, citations to appendices refer to the appendices attached to the Jurisdictional Statement.

over 65% black in Birmingham (House District 38) and two such districts in the so-called "Black Belt" area (House Districts 83 and 86).[6] In addition, Act 82-629 eliminated retrogression in eleven other districts to which the Attorney General had objected (House Districts 19, 20, 33, 36, 46, 59, 65, 71, 81, 90 and 102). Implementation of Act 82-629 will in all likelihood result in the election of fifteen black Representatives this November; by contrast, under the plan ordered into effect by the District Court in 1972 (*Sims* v. *Amos*, *supra*), thirteen black Representatives were elected in the last general election.[7]

On June 8 the Department of Justice issued a letter preclearing the overwhelming majority of districts created by Act 82-629. The only districts that did not receive preclearance at that time were House District 36 in Jefferson County (Birmingham) and House Districts 83, 85, 86, 87, 88 and 90 in the "Black Belt", as well as Senate Districts 13, 28, 29 and 30, containing these House

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[6] The "Black Belt" is an area in the west central part of Alabama, comprising roughly Autauga, Lowndes, Wilcox, Dallas, Perry, Marengo, Hale, Greene, Choctaw, Sumter and Pickens Counties. The name "Black Belt" derives from the color of the soil in this area. Both House Districts 83 and 86 had white incumbents. Thus, appellants are incorrect in stating that, under Act 82-629, "[o]nly one white legislator was given a district with more than 65% black population." Jur. St. at 5 n.9.

[7] In the 1978 general election, blacks were elected in House Districts 38, 39, 41, 43, 44, 45, 49, 67, 77, 80, 98, 99 and 103. In the September 7 primary, which was held pursuant to Act 82-629, as implemented, black candidates won the Democratic nomination (which is tantamount to election) in all thirteen of these districts and in House District 86 as well. In House District 83, a black candidate received the most votes on September 7 and won the September 28 runoff. Under the 1972 court-ordered plan three black Senators were elected in 1978, and all three won the Democratic nomination on September 7.

Districts.[8] Significantly, the Attorney General interposed no objection at that time to the districts that had not been precleared, but rather stated that he would "continue to entertain any additional information forwarded to us regarding a proposed plan during the remainder of the 60-day review period required by statute." Appendix G at A-40.

The District Court subsequently asked the parties to submit alternative configurations for the districts that the Attorney General had not yet precleared. The State submitted a plan and the appellants offered their Plan C but all parties reiterated their preference for the plans they had previously advanced.

On June 21, 1982, the District Court ordered Act 82-629 into effect as an interim plan with one modification: the District Court chose the configuration of House Districts 32, 36 and 44 in Jefferson County offered by the appellants rather than that adopted by the State in Act 82-629.[9] The District Court based its decision on a number of factors, including the obligation to defer to the districting preferences of the State insofar as possible and the time constraints imposed by the upcoming elections. The District Court rejected the appellants' proposal for redrawing the unprecleared "Black Belt" districts (Plan C) because it reconfigured not only those six districts but also twenty-six others which had already been precleared. Appendix A at A-5; *id.* at A-12 (Johnson, J., concurring).

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[8] Senate districts are formed by grouping three contiguous House districts.

[9] In describing the June 21 order, appellants incorrectly state that "[t]he District Court adopted the plaintiffs' proposed modification in Jefferson County by rearranging the boundaries of the district to which the Attorney General had interposed an objection and to two adjacent districts." Jur. St. at 4. In fact, as of June 21, no objection had been interposed.

The Court also noted that the modifications of Act 82-629 proposed by the appellants would have resulted in the reduction of the percentage of blacks in certain "influence" districts (districts where the black population is at least 25%). *Id.* at A-5 & n.1. The District Court was reluctant to accept such modifications since, as the State pointed out, the Attorney General's objection to Act 81-[illegible] had made special mention of the need to preserve existing levels of black voting strength in such districts. *Id.* The concurring opinion observed that Plan C, appellant's proposal, also discriminated against white citizens of the State of Alabama.

> In some of the "modified" districts, plaintiffs "packed" already "safe" black house districts in order to create additional black senate seats. They did so by drastically reducing the percentage of blacks residing in certain surrounding "influence" districts. Thus, the plaintiffs were not satisfied with redrawing districts in order to correct problems in the Black Belt region. Instead, they used the modifications as a guise to create additional black senate seats in other regions of the State. [Appendix A at A-12—A-13 (Johnson, J., concurring) (notes omitted)].

Appellants' motions in the District Court to alter or amend [10] and for a stay of the District Court's order were denied on June 28. Appendix B. Appellants noted their appeal to this Court (Appendix D) and unsuccessfully applied to Justice Rehnquist and to Justice White for a stay. Following the filing deadline for candidates for the

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[10] In appellants' motion to alter or amend, they asked the District Court to implement yet another proposal, Plan D. This proposal reconfigured five already precleared districts in addition to the six unprecleared Black Belt districts. The District Court refused to implement Plan D, observing that appellants "misconceive the ease with which this Court can analyze a redistricting plan and pronounce it superior to other plans." Appendix B at A-28.

State Legislature on July 9, 1982, campaigning for House and Senate seats began.

With the election process already well under way, the Attorney General interposed an objection to Act 82-629 on August 2, 1982, the last day on which he could do so. *See* 28 C.F.R. § 51.8. On August 6, only a month before the primary, appellants asked the District Court to vacate its order of June 21 implementing Act 82-629 with slight modification as the interim plan. Appellants argued that the Voting Rights Act prohibited the District Court from using districts to which the Attorney General had objected, even on an interim basis. On August 10, 1982, the District Court denied the appellants' motion. Appendix C. Appellants noticed an appeal (Appendix E) and applied to Justice Powell for a stay. Their application was denied on August 31.

The District Court has given the State until March 1, 1983 to pass a new reapportionment and to obtain preclearance. Order of August 27, 1982 (attached hereto as Appellees' Appendix 1).[11] The District Court has announced its intention "to require an election for new legislators under a permanent plan no later than the fall of 1983."[12] Appellees' Appendix 1 at 2a

On September 7, primary elections were held using the interim plan. The runoff election was held September 28, and the general election is scheduled for November 2. Thus, the State is on the last lap as far as this year's legislative elections are concerned.

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[11] The District Court's August 27 order apparently was not available to the appellants when the Jurisdictional Statement was filed on August 31. The District Court had previously ordered the State to submit a precleared plan by February 1 (Appendix K), but upon motion of the State (Appendix L) extended the deadline to March 1.

[12] The appellants' statement that the District Court "did not specify when a special election . . . would be ordered," Jur. St. at 6, is incorrect, since the District Court's August 27 order makes clear that elections will be held no later than the fall of 1983.

ARGUMENT

EXIGENT CIRCUMSTANCES JUSTIFIED THE DISTRICT COURT'S REFUSAL TO MODIFY THE INTERIM PLAN FOLLOWING THE ATTORNEY GENERAL'S OBJECTION

1. Appellants assert that

> [t]he instant appeal addresses the District Court's more recent refusal [on August 10, 1982] to modify its interim plan even though that plan utilized the six Black Belt House Districts and corresponding Senate Districts to which the Attorney General entered a formal objection on 2 August 1982. [Jur. St. at 5-6].

We observe at the outset that the issue presented by appellants in this Court differs from that raised by them in the District Court. Appellants asked the District Court to adopt either their Plan B or Plan D and then utilize the election schedule which they proposed (see Appendix J at A-46). That the District Court so understood appellants' motion is apparent from the language of the August 10 order, which states:

> Plaintiffs' motion filed with this Court August 6, 1982, asking that this Court vacate its order of June 21, 1982, adopt plaintiffs' Plan B, or in the alternative, modify the June 21 order by adopting plaintiffs' Plan D and adopt a new election schedule, is ORDERED to be and is hereby denied. [Appendix C at A-32].

In this Court, however, appellants do not challenge the District Court's rejection of their alternative plans. Appellants' sole claim of error is that the District Court failed to postpone the upcoming general election.[13] But

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[13] Their prayer for relief is consistent with this approach. They seek to have this Court

> grant a stay of the District Court's order, and vacate and remand to the District Court for the purpose of implementation

appellants never argued to the District Court that the election should be postponed because of the August 2 objection, even if neither of their proposed plans was adopted. Whatever may have prompted this tactic,[14] appellants cannot simply shift gears and present to this Court an issue never raised below. For this reason, we submit that their appeal should be dismissed. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 323, n.1.[15]

2. In essence, appellants take the position that a District Court may *never* implement, even on a temporary basis, districts to which the Attorney General has interposed an objection. Appellants must take this absolutist position because, notwithstanding their assertion to the

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of a plan which does not adopt parts of the State's plan to which the Attorney General has objected. [Jur. St. at 15].

If this prayer were granted the District Court would be required, prior to the election, to adopt some alternative plan of its own, which, of course, would require additional time, as the Court's June 21 and June 28 orders make clear. See Appendix B at A-30 (June 21 opinion was predicated "on the inability of this Court to devise a plan or analyze proposed plans within the time constraints urged on this Court at that time by all parties").

[14] Plaintiffs may have hoped that, if faced with the choice of allowing the elections to go forward on the basis of the plan which had been disapproved (as to certain districts) by the Attorney General, and allowing it to go forward on the basis of one of the alternative plans submitted by plaintiffs, but disapproved by the District Court, the Court would prefer the latter alternative. Possibly too, the plaintiffs refrained from asking the District Court to develop its own plan and to postpone the election (the relief sought here) because the Court had previously ruled unanimously that a delay which would extend the present incumbents' term was unacceptable, see p. 12, *infra*.

[15] In *Dothard* the Court declared that an issue which had not raised in the District Court "is not before us" (433 U.S. at 323, n.1). The appeal there was not dismissed because other issues, properly raised below, were presented. Here, however, appellants raise only the single question whether the District Court was required to postpone the election, so that nothing remains of their appeal if that issue is rejected as untimely.

contrary (Jur. St. at 7), exigent circumstances exist that fully justified the District Court's refusal to modify the interim plan.[16]

These exigent circumstances are as obvious as the dates on the calendar. When the Attorney General objected to Act 82-629 on August 2, only five weeks remained before the primary. The filing deadline for candidates had already passed, and campaigning had already begun. As a practical matter, the District Court simply could not complete the herculean task of asking the parties to propose new plans, evaluating those plans, choosing among them, and deciding upon an election schedule in time for elections to go forward as planned.[17] Thus, the District Court faced a choice between (1) al-

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[16] Insofar as appellants contest the validity of the June 21 order, *see* Jur. St. at 10-12, their argument is foreclosed by this Court's recent decision in *Upham* v. *Seamon*, —— U.S. ——, 102 S. Ct. 1518 (April 1, 1982). In *Upham*, the District Court fashioned an interim plan for Texas' congressional districts that redrew not only two districts in South Texas to which the Attorney General had objected but also four other districts in Dallas County which he had precleared. This Court reversed, holding that the District Court should have modified only those districts to which the Attorney General had actually objected. 102 S. Ct. at 1522. In accordance with *Upham*, the District Court in its June 21 order properly deferred to the State Legislature's judgment insofar as it implemented Act 82-629 as the interim plan. If the entry of an objection to part of a plan falls short of endowing a district court with authority to disregard aspects of such plan which were not objected to, it follows *a fortiori* that, as of June 21, the District Court in this case had no authority to reject the State's plan, since, at that time, *no* objection had been interposed. *United States* v. *Board of Supervisors*, 429 U.S. 642, offers no support to appellants' position, since it stands only for the proposition that, in a suit to enforce compliance with Section 5, a district court does not have the authority to address the merits of a reapportionment plan.

[17] Of course, if this Court should vacate the District Court's order, the District Court would be obliged not only to choose a new plan and develop a new election schedule but also to direct new primary and runoff elections.

lowing elections to go forward as scheduled using a plan that contained 98 House districts (out of a total of 105) which had obtained the statutory preclearance; (2) allowing elections to go forward based on one of appellants' plans which had been disapproved for reasons whose validity is not questioned here; and (3) permitting incumbent legislators to continue serving in grossly malapportioned and hence unconstitutional districts pending implementation of a new interim plan (an alternative urged by neither party in August 1982). The District Court quite properly chose the first alternative.

In short, it cannot be gainsaid that exigent circumstances existed at the time of August 10 order. Indeed, the District Court found as early as June 21 that exigent circumstances existed. Appendix A at A-8. ("Because of severe time restraints, . . . this Court has a choice of implementing on an interim basis the legislative plan which has been evolving over months or plaintiffs' Plan B which has not been adequately studied or evaluated other than by plaintiffs.") As stated by Judge Johnson in his concurring opinion, "[T]he election deadlines continue their inexorable approach and an interim plan must be implemented." *Id.* at A-13. In denying appellants' Motion to Alter or Amend on June 28, the District Court stated that, in implementing an interim plan, it "did what all parties agreed last week was necessary—entered a final decision in order to allow the elections to proceed." Appendix B at A-29. *See also, id.* at A-28. On June 28, the District Court unanimously and unequivocally rejected appellants' suggestion, made "[b]elatedly and inconsistently," that elections be postponed until a new plan could be developed. Appendix B at A-29.

> This suggestion if implemented, would have the effect of encouraging legislators to procrastinate with constitutional redistricting requirements since they would remain in office until the new elections could be held after the process of redistricting had been completed. [Appendix B at A-29].

Given the severe time constraints imposed by the imminent elections and the District Court's explicit findings regarding these exigencies, one cannot deny that the District Court acted properly on August 10 in refusing to modify its interim plan. Only last Term this Court observed that

> [w]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations. [*Upham* v. *Seamon*, *supra*, 102 S. Ct. at 1522 (citations omitted)].

This statement reaffirmed the authority of the district courts declared in *Reynolds* v. *Sims*, 377 U.S. 533, 585:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

In *Reynolds*, this Court held that the District Court (the same District Court whose actions are challenged in the present case) "acted in a most proper and commendable manner," 377 U.S. at 586, in implementing a temporary reapportionment plan for purposes of the 1962 legis-

lative elections using parts of two proposed plans which violated the constitutional requirement of one-person, one-vote. This Court noted that the interim relief ordered by the District Court permitted elections to be held without great difficulty and without usurping the legislature's responsibility for reapportionment. *Id.*[18]

If, as the decisions of this Court establish, a district court may permit impending elections to be held under an *unconstitutional* reapportionment plan when the exigencies of time so require, it follows that a district court may permit elections to be held under an interim plan that does not meet statutory requirements, including those set forth in the Voting Rights Act of 1965. This conclusion is buttressed by *Georgia* v. *United States*, 411 U.S. 526. In that case the District Court enjoined the State of Georgia from holding elections for its House of Representatives under a plan to which the Attorney General had interposed an objection. This Court stayed the injunction and permitted elections to be held under the State's apportionment, notwithstanding the objection. 411 U.S. at 528. When the State appealed on the merits, this Court affirmed the injunction, but refused to set aside the elections held pursuant to the unprecleared plan. *Id.* at 541 ("Since . . . elections were conducted under the disputed 1972 plan by reason of this Court's stay order, it would be inequitable to require new elections at this time.") *See also Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (refusing to order new elections even though elections had been conducted pursuant to an unprecleared plan).

In *Terrazas* v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), a three-judge court hearing challenges to Texas'

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[18] *See also, Wells* v. *Rockefeller*, 394 U.S. 542, 547 ("[s]ince the 1968 primary election was only three months away . . ., we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities."); *Kilgarlin* v. *Hill*, 386 U.S. 120 (District Court properly allowed elections to go forward notwithstanding unconstitutional population variances in plan).

state legislative redistricting plan read *Georgia* and *Perkins* as holding that

> the grant of equitable temporary relief by [a district court] through the use of districts that are the subject of Section 5 objections is not per se contrary to the prohibitions of Section 5. As emphasized in *Georgia*, it is equitable considerations which determine what *temporary* plan should be utilized. [537 F. Supp. at 539.] [19]

Citing cases in which this Court had permitted elections to proceed using malapportioned districts in light of exigent circumstances, the *Terrazas* court held that

> the same principle should be applicable to a plan as to which a Section 5 objection has been raised: in emergencies, a court should be permitted to proceed on the basis of such a plan or portions of such a plan if that is the only fair and equitable alternative to disruption of the election process. [*Id.* at 538].

Applying this principle, the *Terrazas* court ordered into effect an interim plan that included districts to which the Attorney General had objected, on the grounds that otherwise the primary (which was two months away at the time of the decision) would be disrupted. *Id.* at 539.

In light of the exigencies imposed by the election schedule, the District Court in this case acted properly in refusing to alter the interim reapportionment plan when the Attorney General interposed an objection to Act 82-629 only five weeks before the primary. The decisions of this Court on which appellants rely are not to the contrary. *Hathorn* v. *Lovorn*, —— U.S. ——, 102 S. Ct. 2421 (June 15, 1982) (Jur. St. at 11), does not purport to restrict the authority of federal district courts to order into effect temporary reapportionment plans when exigent circumstances so require. *Hathorn* held that state

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[19] The United States District Court for the District of Columbia has likewise so interpreted this Court's decisions in *Georgia* and *Perkins*. See p. 17, *infra*.

courts have the duty to determine whether Section 5 applies in a given case and "must . . . refrain from ordering relief that would violate federal law." 102 S. Ct. at 2430 (note omitted). But the issue here is whether the District Court's order allowing the election to be held is "relief that would violate federal law" (*Id.*). Hathorn reaffirms that such relief does not violate federal law. Noting that the "United States has initiated a federal suit challenging the change [in election law] at issue here," 102 S. Ct. at 2430, the *Hathorn* opinion went on to state that

> [a]s we noted in Perkins v. Matthews, 400 U.S. 379, 395-97 (1971), a local District Court is in a better position than this Court to fashion relief, because the District Court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence. *Id.*, at 397. In this case, the District Court for the Northern District of Mississippi will be better able to decide whether a special election is necessary, whether a more moderate form of interim relief will satisfy § 5, *or whether new elections are so imminent that special relief is inappropriate.* [*Id.* at 2430-31 (note omitted) (emphasis added)].

In the instant case, the District Court held, in light of its familiarity with the exigencies of the local situation in Alabama, that the 1982 state legislative elections should proceed on the basis of an interim plan and that special relief was inappropriate. The District Court also directed the State to obtain preclearance by March 1, 1983 and stated that a special election would be held no later than the fall of 1983. These holdings are wholly in accord with the District Court's remedial power as recognized in *Hathorn*.

Moreover, the decision of the District Court in this case does not conflict with *Busbee* v. *Smith*, No. 82-0665 (D.D.C. May 24, 1982), on which appellants especially rely (Jur. St. at 11). The Court in *Busbee* did not decide that a District Court is required to postpone an

election if the Attorney General has interposed an objection to the statute pursuant to which that election is to be held. On the contrary, the District of Columbia Court, citing *Georgia* and *Perkins*, *supra*, has stated, "[t]he Supreme Court has recognized the equitable power of the District Courts to permit enforcement of such [apportionment] statutes *pendente lite* notwithstanding Section 5." *Horry County* v. *United States*, 449 F. Supp. 990, 996 (D.D.C. 1978).[20] What the Court did decide in *Busbee* was that under the circumstances of that case the holding of the election after the Attorney General's objection would be improper. But the circumstances in *Busbee* are entirely different from those which prompted the District Court in this case to allow the election to proceed as scheduled.

In *Busbee*, the Attorney General objected in May 1982 to Georgia's congressional redistricting plan. Unlike Alabama, Georgia made no effort to revise the plan in response to his objection, but instead brought a declaratory judgment action under Section 5 and began to implement the plan on an interim basis pending resolution of that action. In effect, Georgia treated its own action as granting it an automatic stay of the Attorney General's disapproval. In addition, Georgia engaged in numerous delaying tactics.[21] The time sequence in *Busbee* also differs critically from that in this case. In *Busbee*, the Attorney

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[20] *Accord*, *Charlton County Board of Education* v. *United States*, 459 F. Supp. 530, 536 (D.D.C. 1978) (declining to enjoin primary, in part on grounds that injunction "would engender confusion among the electorate and hamper the election officials' task of conducting the primary for other county offices in an orderly and efficient manner").

[21] Appellants also imply that, here, as in *Busbee*, the State sought to delay resolution of the Section 5 issue long enough to plead that exigent circumstances required use of the State's plan for the 1982 election (Jur. St. at 3, 11). Here, Alabama responded promptly to the Attorney General's May 6 objection to Act 81-1049 and complied with the District Court's order to submit a proposed interim plan by June 8. See note 4, *supra*.

General objected *before* the election process had begun. In the instant case, on the other hand, the Attorney General objected only five weeks before the primary, *after* the filing deadline for candidates had passed and *after* campaigning had begun.

Thus, in the present case, the District Court properly exercised its remedial authority in implementing Act 82-629 (as modified) as an interim plan and in refusing to modify it after the Attorney General objected to Act 82-629 on August 2. By ordering the State to pass a new plan and obtain preclearance by March 1, 1983, the District Court recognized that preclearance is a prerequisite for any *permanent* redistricting plan, unless that plan is fashioned by the court. *Connor* v. *Johnson*, 402 U.S. 690. At the same time, the District Court correctly recognized in its June 21 order that the Attorney General "has not acted in time for the elections to proceed in accordance with any decision he renders." Appendix B at A-28. Accordingly, the District Court "did what all parties agreed . . . was necessary," by implementing a *temporary* plan "in order to allow the elections to proceed." *Id.* at A-29.[22] In using Act 82-629 as the interim plan, the District Court properly deferred to the State's redistricting policies. *Upham* v. *Seamon*, *supra*. When the Attorney General actually interposed an objection to Act 82-629 only five weeks before the primary, the District Court properly refused, in light of exigent circumstances, to modify the interim plan.

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[22] The fact that the District Court's plan is a temporary one distinguishes this case from *McDaniel* v. *Sanchez*, 452 U.S. 130, in which this Court held that preclearance was required for implementation of a permanent plan developed by the State in response to a court order declaring the existing plan unconstitutional. *See Terrazas* v. *Clements*, *supra*, 537 F. Supp. at 539; *Seamon* v. *Upham*, 536 F. Supp. 931, 939 n.7 (E.D. Tex.), *rev'd on other grounds*, 102 S. Ct. 1518 (April 1, 1982).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully submitted,

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